Southgate Village, Inc. *and* United Food & Commercial Workers Union, Local 1657, AFL–CIO, CLC *and* Robert Tarver. Cases 10–CA–26794, 10–CA–26862, and 10–RC–14358

December 11, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The principal issues presented in this case[1] are whether the administrative law judge properly found that (1) the Respondent violated Section 8(a)(3) and (1) of the Act by temporarily laying off employee Robert Tarver; (2) Tarver was not entitled to any backpay remedy; and (3) the Respondent violated Section 8(a)(1) of the Act by granting an across-the-board wage increase and improved benefits prior to a representation election. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] except as discussed below, and to adopt the recommended Order as modified.[4]

In affirming the judge's finding that the wage increase violated Section 8(a)(1) of the Act, we reject the Respondent's argument in its exceptions that the judge impermissibly shifted to the Respondent the ultimate burden of proving that it did not grant a preelection benefit in order to influence the employees to vote against the Union. The General Counsel must prove by a preponderance of the evidence that employees would reasonably view the grant of benefits as an attempt to interfere with or coerce them in their choice on union representation. Evidence that an employer granted benefits during the preelection period is sufficient objective proof warranting the presumption of unlawful effects, but an employer may rebut that presumption by demonstrating a legitimate business reason for the timing of the raise. The Respondent here failed to make such a showing.

AMENDED REMEDY

We agree with the judge, for the reasons set forth in his decision, that the Respondent discriminatorily selected Tarver for a temporary layoff. (We do not rely, however, on the judge's speculation about other possible reasons for Tarver's layoff.) We disagree with the judge's determination that the Respondent does not have any backpay liability for its unlawful action because Tarver took 2 weeks of accrued paid vacation leave for the period in which he would otherwise have been laid off.

The Respondent's unlawful layoff action forced Tarver to take accrued vacation pay, or else go without pay, for a time when he should have been earning regular pay for working his regular schedule. It is no windfall to restore such money to him. On the contrary, it would be a windfall to the Respondent, the wrongdoer in this case, to relieve it of the responsibility of restoring to Tarver the vacation pay that he would not have used in the absence of the Respondent's unlawful discrimination. See *Central Freight Lines*, 266 NLRB 182, 182–184 (1983), and cases cited there. Accordingly, we shall order the Respondent to make Tarver whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest to be computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Southgate Village, Inc., Bessemer, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(e).

''(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.''

2. Insert the following as paragraphs 2(a), (b), and reletter the subsequent paragraphs.

''(a) Make whole Robert Tarver for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the amended remedy section of the Board's decision.

''(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-

[1] On May 17, 1994, Administrative Law Judge Philip P. McLeod issued the attached decision. Both the Respondent and the General Counsel filed exceptions and supporting briefs. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] There are no exceptions to the judge's conclusion that the General Counsel failed to prove several allegations of 8(a)(1) misconduct.

[4] The General Counsel has excepted to the judge's conclusion that a bargaining order is not necessary to remedy the Respondent's unfair labor practices. On October 12, 1995, however, the Union filed a letter requesting withdrawal of the petition in Case 10–RC–14358, so that it ''may begin a new campaign.'' We grant the request to withdraw the petition. Implicitly, the Union also withdrew its request for a bargaining order in the unfair labor practice cases. There is no opposition from the General Counsel or the Charging Party in Case 10–CA–26862. Under these circumstances, we find no need to pass on the bargaining order issue.

cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.''

3. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the petition in Case 10–RC–14358 is dismissed without prejudice.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT grant employees wage increases in order to dissuade them from supporting the Union.

WE WILL NOT grant employees improved benefits, including improved sick leave, funeral leave, and disability leave in order to dissuade them from supporting the Union.

WE WILL NOT limit employees from talking about the Union on companytime.

WE WILL NOT lay off employees because of their activities on behalf of, or sentiments favoring, the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Robert Tarver whole, with interest, for any loss of earnings and other benefits resulting from his temporary layoff.

SOUTHGATE VILLAGE, INC.

Susan Pease Langford, Esq., for the General Counsel.
Clifford H. Nelson Jr., Esq. and *William P. Steinhaus, Esq. (Wimberly & Lawson, P.C.)*, of Atlanta, Georgia, for the Respondent.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case on October 19–22, 1993,[1] in Birmingham, Alabama. The case originated from a petition filed on March 11, 1993, in Case 10–RC–14358 pursuant to which the Union seeks to represent employees of Southgate Village, Inc. in Bessemer, Alabama. On May 21, the Board conducted an election among all full-time and regular part-time employees at that facility. Of the approximately 50 eligible voters, 22 cast votes for and 26 cast votes against union representation. There were two challenged ballots and no void ballots. On May 28, the Union filed timely objections to conduct affecting the results of the election.

Also on May 28, the Union filed a charge in Case 10–CA–26794, which was later amended on July 30. On July 6, Robert Tarver filed the charge in Case 10–CA–26862, which was later amended on July 15.

On August 4, an order consolidating cases, consolidated complaint, and notice of hearing issued that alleges, inter alia, that Southgate Village Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by various acts and conduct. Counsel for the General Counsel seeks as a part of its remedy that Respondent be required to recognize and bargain with the Union.

In its answer to the consolidated complaint, Respondent admitted certain allegations, including the filing and serving of the charges, its status as an employer within the meaning of the Act; the status of United Food & Commercial Workers Union, Local 1657, AFL–CIO, CLC as a labor organization within the meaning of the Act; and the status of certain individuals as supervisors and agents of Respondent within the meaning of Section 2(11) of the Act. Respondent denied having engaged in any conduct that would constitute an unfair labor practice within the meaning of the Act and/or would constitute sufficient grounds for setting aside the election here.

At the trial herein, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, counsel for General Counsel and Respondent both filed timely briefs with me that have been duly considered.

On the entire record in this case and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Southgate Village, Inc. is, and has been at all times material, an Alabama corporation with an office and place of business located at Bessemer, Alabama, where it is engaged in the operation of a nursing home. In the course and conduct of its business, Respondent annually derives gross revenues in excess of $100,000 and causes to be shipped to its Bessemer facility goods valued in excess of $50,000 directly from sources located outside the State of Alabama.

Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

United Food & Commercial Workers Union, Local 1657, AFL–CIO, CLC is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates here refer to 1993 unless otherwise stated.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

American Health, Inc. owns and operates seven nursing homes located in four States. Each of the facilities is independently incorporated, but under the direct management and control of American Health. Three of these seven facilities are located in Alabama—two in Bessemer and one in Greensboro. Respondent is one of the facilities located in Bessemer. The other Bessemer facility, known as Livingston, is located immediately adjacent to Respondent, Southgate. Employees at the Greensboro facility are represented for purposes of collective bargaining by the Union, and are covered by a collective-bargaining agreement between Respondent and the Union negotiated during the fall of 1992.

All seven of the nursing homes provide long-term nursing care to a community of geriatric residents. These homes vary in size from 59 to 102 beds. Respondent Southgate has 84 beds and employs about 70 employees. Approximately 50 of these employees were included in the bargaining unit which the Union seeks to represent.

In August 1990, American Health hired Larry Allen as corporate vice president and director of operations for each of its seven facilities. Allen is located at American Health corporate headquarters in Conshohocken, Pennsylvania. The administrator of each facility, including Southgate Administrator Susan Williams, reports directly to Allen. Allen reports to Corporate President Stanley Stein.

Soon after he was hired, Allen began to develop and direct the implementation of a comprehensive ''5-year plan'' for American Health. The plan emphasized specific goals for each successive year, focusing on such matters as basic operations, motivation of employees, training, team building, and proper management techniques. Allen had experience administering employee surveys developed by David Jones, a former colleague of Allen's at Manor Heath Care Corporation. On February 15, 1993, Allen hired Jones to become director of employee relations for all of American Health's seven facilities.

B. *Employee Surveys and Wage Increase*

David Jones' first assignment as director of employee relations was to conduct employee surveys at each of the seven nursing homes, starting with the four facilities located in Indianapolis, Indiana, and Bessemer, Alabama. American Health has two nursing homes in each of these cities, and by targeting these first, Jones could complete the surveys at more than half of Respondent's facilities in only two stops. Jones conducted the first survey at Livingston and the second at Southgate, followed by the two Indianapolis facilities. A survey was not conducted at the Greensboro, Alabama facility where employees were already represented by the Union.

The surveys at Livingston and Respondent Southgate were conducted on March 3 and 4, respectively. Jones testified credibly that when he developed the employee survey he was not aware of any union activity at the Southgate facility. Jones testified credibly that he first learned of employee union activity at Southgate when he arrived at that facility to conduct the survey. I credit this testimony. At the same time, Director of Operations Larry Allen was at least aware of a general organizing or representational interest by the Union in Southgate employees as of February 24. On that date, Allen met with representatives of the Union, at which time the Union asked Allen to extend recognition to it as the bargaining representative of employees at Southgate. It is not altogether clear from the record whether the Union made this request based on authorization cards signed by employees or based simply on the fact that it already represented employees at Greensboro. This issue is discussed in greater detail below in connection with the requested bargaining order remedy. Whichever it was, however, it is clear that as of February 24, Allen had reason to know that the Union was seeking to represent employees at Respondent Southgate. The Union filed its petition in Case 10–RC–14358 on March 11.

The primary purpose of the employee survey was admittedly to assess employee job satisfaction. The complaint, however, does not allege and counsel for the General Counsel does not argue that the survey conducted at Southgate on March 4 was unlawful. In late March 1993, well after the petition seeking to represent Southgate employees had been filed by the Union, Jones returned to the Southgate facility where he conducted large group meetings among employees to discuss the results of the survey. It is undisputed Jones told employees the survey showed that many employees were unhappy with their jobs and their wages. Respondent admits that during these meetings in late March a 40-cent-per-hour wage increase was announced effective April 1.[2]

Employee Verna Walden, who impressed me as being very credible, testified that during these late March meetings Jones told employees he had found there were a lot of things wrong at Southgate and that he would make changes in order to make things better. Walden testified Allen stated that he was going to get employees better insurance and that they were going to get a new employee handbook, as well as the 40-cent-per-hour raise. Employee Jackie Carter, who also impressed me as being very straightforward and credible, testified that Jones stated he had learned from the surveys that there were a lot of unhappy employees. According to Carter, Allen then announced the 40-cent-per-hour raise for every employee. Carter testified that before this raise there had never been an across-the-board raise for all employees.

Director of Operations Larry Allen testified that he had no knowledge of a Board-conducted election being scheduled when he announced the 40-cent-per-hour wage increase in late March 1993. This is not surprising since the Decision and Direction of Election did not issue until since April 22. Allen did not claim that he was unaware of the petition having been filed on March 11 when he announced the raise. Allen testified that once every year Respondent undertakes a ''wage survey'' in conjunction with its ''budgeting process.'' Southgate Administrator Susan Williams testified that Respondent has granted annual across-the-board increases in 1990, 1991, and 1992, in addition to the raise granted in 1993. A summary of the alleged increases, two wage review surveys, and various records were introduced by Respondent in support of its contention that employees have previously received annual across-the-board wage increases.

[2] The complaint alleges that, on or about April 6, Jones unlawfully questioned employees about previous union activities, but no evidence was offered to support this allegation. Accordingly, it is dismissed.

Administrator Susan Williams testified that she prepared a wage survey in September 1991, and that Joan Willis prepared a comparable survey in October 1992. Williams' testimony on direct examination and Respondent's wage increase summary and wage surveys suggest that employees received a wage increase in April 1991 of 45 cents per hour and another increase in 1992 as a result of the September 1991 wage survey. On cross-examination, however, Susan Williams' testimony was circuitous and often nonresponsive. When asked about the 1991 wage survey and the wage increase which employees supposedly received as a result of that survey, Williams testified variously that all employees received an across-the-board increase, that all employees were raised to at least $4.50 per hour, that employees received raises so that the ''average wage'' was $4.50 per hour, and that the raises were ''equivalent to 40 cents across the board.'' When I asked Williams what she meant by ''equivalent,'' Williams testified, ''It would have been a minimum of 40 cents across-the-board to have increase this to $4.50 as a average wage.'' In further testimony, Williams admitted that while she recommended in September 1991 that wages be increased to $4.50 per hour her recommendation was not followed and nursing assistants did not receive the suggested increase. A careful review of the exhibits introduced by Respondent strongly suggests that in fact no across-the-board wage increases were given to nursing assistants as claimed by Allen and Williams. In fact it appears that the salary changes reflected on Respondent's exhibit for 1990 and 1991 are no more than a change in the Federal minimum wage and a uniform allotment paid to the employees.

C. *Conversations Between Supervisors and Various Employees*

1. Conversation between Katrina Dancy and Director of Nursing Loretta Williams

Katrina Dancy testified that one evening Director of Nursing Loretta Williams called Dancy to her office. According to Dancy, Williams stated, ''I know you're not going to tell me the truth anyway, but does your name appear on the Union's list?'' Dancy asked what list Williams was referring to, and Williams allegedly responded that David Jones had a list with the names of all the union supporters. According to Dancy, she had never before disclosed her union sentiments to anyone at Southgate Village.

The complaint alleges that this conversation took place on or about March 15, 1993. Dancy, however, placed no date on the conversation. I was not particularly impressed with Dancy's reliability or credibility. On cross-examination, Dancy was particularly abrasive and argumentative. I have serious doubts about whether this conversation ever took place between Dancy and Williams. I am utterly convinced, however, that whatever conversation might have occurred was either misconstrued or misunderstood by Dancy. It is entirely possible, of course, that some conversation did take place between Dancy and Williams concerning a list—perhaps the *Excelsior* list complied by Respondent naming eligible voters. I found Dancy's overall demeanor, however, too questionable to rely on her testimony in making any finding that Williams unlawfully interrogated Dancy. Accordingly, I shall dismiss that allegation from the complaint.

2. May 1993: Conversation between Katrina Dancy and Supervisor Helen Tootle

Although it is not addressed in counsel for the General Counsel's posttrial brief, the complaint alleges that Housekeeping Supervisor Helen Tootle unlawfully interrogated Dancy about her union activities and sentiments. Dancy testified that she and Tootle are cousins, and that the two see each other both at and outside work. Tootle was a supervisor, but not Dancy's supervisor. Dancy testified that one day at work while the two of them happened to be walking down a hallway together, she began a conversation with Tootle. According to Dancy, Tootle then asked her how Dancy felt about the Union. Dancy responded by saying that she had read materials the Union was passing out, but nothing more. Tootle, who had herself been receiving mail from the Union, responded by asking if Dancy had not gotten any letters in the mail from the Union. Dancy replied, ''No,'' and the conversation ended.

Tootle was not called as a witness by Respondent. Although I have reservations about Dancy's reliability as a witness, expressed above, Dancy's version of this conversation seemed more reliable than other parts of her testimony, probably because she herself viewed the conversation as particularly casual, and described it in such a manner. The Board has long recognized that the circumstances of each incident must be considered in determining whether a specific conversation constitutes unlawful interrogation. *Rossmore House*, 269 NLRB 1176 (1984). In these circumstances, I find that Tootle's question directed to Dancy does not constitute coercive interrogation of the type that would violate the Act. Tootle and Dancy are cousins who see each other both at and outside of work. Although Tootle is a supervisor, she is not Dancy's supervisor. It was Dancy who initiated the particular conversation that for some reason caused Tootle to ask Dancy how she felt about the Union. I find it hard to conclude that under these circumstances an employee in Dancy's position could be said objectively to have been coerced or intimidated by Tootle's question. Accordingly, I find that Tootle did not violate Section 8(a)(1) of the Act, and I shall dismiss that allegation from the complaint.

3. May 1993: Conversation between Brenda Howard and LPN Pat Hill

Brenda Howard testified that during the first week of May 1993, she and two other employees were talking with LPN Patricia Hill on one occasion when all of them stepped outside the facility on a cigarette break. While they were talking, Hill stated that she thought the president of Southgate Village would close the place if employees voted in a union. Howard responded that she did not believe he would do that. Hill then said that she had worked at another facility which closed after a union was voted in by employees. Hill added, ''True enough, we got the Union but we didn't have a job.'' When Howard stated she did not believe Allen would close Southgate Village because it was making money, Hill insisted, stating, ''Yes, he will.''

Counsel for the General Counsel did not call either of the other two employees who participated in this conversation with Hill, which is unfortunate because I have some reservation about Howard's credibility based on my observation of her as a witness. Patricia Hill denied making this

threat/predi-cation to Howard, and I found Hill overall to be a very credible witness. As between Howard and Hill, I credit Hill. Accordingly, I find that counsel for the General Counsel has failed to carry its burden of proof on this allegation, and I shall dismiss it from the complaint.

4. May 1993: Conversation between Evelyn Muse and Director of Nursing Loretta Williams

Evelyn Muse testified that about 2 weeks prior to the election, she went to Director of Nursing Loretta Williams' office one day to ask Williams about taking a day off. According to Muse, while meeting with Williams, Muse asked Williams how Williams felt about the Union. Muse testified that Williams responded by saying that if she thought it would help, she would go for it, but that she did not really think it would help. According to Muse, Williams told Muse that she thought Robert Tarver was being paid by the Union and was coaching the employees. According to Muse, Williams went on to say that, ''Robert had one foot in and one foot out; that they were gonna do everything in their power to get rid of him.'' Muse also testified that in this same conversation Williams stated, ''She was gonna tamper with his schedule'' by giving him only ''1 day this week, maybe 1 or 2 days the next week,'' hoping that Tarver might get mad and quit. According to Muse, Williams also went on to say that she, Williams, was out looking for another job because she ''was afraid that Allen was gonna close the nursing home down.''

The only portion of Muse's testimony that Williams agrees with is that Muse once asked Williams what Williams thought about a union. Williams testified that all she told Muse was to pray about it and that she could not tell Muse how to vote.

I credit Williams over Muse. Certain portions of Muse's testimony struck me as altogether unlikely or implausible. I can think of no reason whatever why Williams would simply volunteer that Respondent was going to try to get rid of Tarver by manipulating his work schedule. My observation of Muse as a witness did not do anything to instill confidence in her testimony. Loretta Williams on the other hand was remarkably credible, even including her testimony on cross-examination regarding her feeling free to support a union herself if she wanted. Usually I find claims of this sort to be utterly ludicrous, usually because of the self-serving and bombastic manner in which they are made. If Williams was lying in any of her testimony, however, she is a very good liar indeed, for I found her entirely credible. Accordingly, I find that Williams did not threaten Tarver's job nor threaten, either expressly or impliedly, that Respondent would close the Southgate facility if employees selected the Union to represent them for purposes of collective bargaining. Accordingly, I shall dismiss those allegations from the complaint.

5. May 1993: Conversations between or overheard by Jenifur Harris and Director of Nursing Loretta Williams

Jenifur Harris worked as a certified nursing assistant from August 1992 to July 1993. Harris testified that sometime after she signed a union card, she overheard Director of Nursing Loretta Williams speak to another certified nursing assistant, Gwen Morris, about a union leaflet Morris was holding. Harris testified she heard Williams tell Morris that she could not bring the union leaflet she was holding into Southgate. According to Harris, Williams told Morris that she would have to do something with it. Harris testified that she was not aware of any rule preventing employees from bringing anything into the nursing home.

Counsel for the General Counsel did not call Gwen Morris to testify. Director of Nursing Loretta Williams credibly denied the statement to Morris. The complaint alleges that Williams unlawfully prohibited employees from possessing union literature in the facility while allowing possession of nonunion literature. The complaint does not allege, counsel for the General Counsel does not argue, and there is no evidence showing that Respondent allowed possession of antiunion literature. Therefore, when the complaint refers to ''nonunion literature'' it must be referring to every form of literature other than prounion literature, and Harris' testimony was intended to show that Respondent does not have any rule generally prohibiting possession of literature. Counsel for the General Counsel apparently chooses to overlook or ignore the fact that Respondent maintained a no-solicitation rule that is lawful on its face. Often, although not always, distribution of union literature also involves solicitation. There is really no evidence whatever that the conversation between Williams and Morris, even assuming it occurred, was anything other than Respondent's valid enforcement of its no-solicitation rule. Equally important, counsel for the General Counsel did not bother to call Morris to testify, and Director of Nursing Loretta Williams credibly denied the conversation. Accordingly, I shall dismiss this allegation from the complaint.

Jenifur Harris also testified that she participated directly in a conversation with Director of Nursing Loretta Williams in Williams' office. According to Harris, she and fellow employee Annie Barham stopped in Williams' office one day, as was the practice, about 10 minutes before clock-in time. Harris testified that while in the office, Williams stated she was looking for a job because Allen was going to close down the nursing home.

Harris was a less than impressive witness. I had the distinct impression as I observed her that Harris testified not so much to what someone said to her or in her presence, but to what she understood whatever it was that was actually said to mean. Unfortunately, once again, counsel for the General Counsel did not call the potentially corroborating witness, in this case Annie Barham, to testify. As I have already noted, Director of Nursing Loretta Williams was a particularly credible witness, and she credibly denied any conversation with Jenifur Harris regarding Williams' looking for a job and/or Respondent closing the facility. Accordingly, I shall dismiss that allegation from the complaint.

6. May 1993: Administrator Susan Williams' meeting with employees

Jenifur Harris testified that she attended a meeting called by Administrator Susan Williams along with other certified nursing assistants including Gwen Morris, Ophelia Twilley, and LaShaunda Williams. According to Harris, Susan Williams first asked the employees if they had gotten their annual raises. Williams then stated that if they had not already received their annual raises, they may not get one. According to Harris, Administrator Williams also made the statement

that if employees did vote the Union in to represent them, the 40-cent across-the-board raise which they had received would probably be taken away.

As I have noted above, throughout much of Harris' testimony I had the distinct impression that she was not so much testifying to what someone else said to her but to the way in which she interpreted what was said. In the case of Administrator Susan Williams' meeting with the employees, it was particularly apparent that Harris could not remember what Williams actually said. Harris placed Ophelia Twilley as being at this meeting, and while counsel for the General Counsel called Twilley as a witness, she did not ask Twilley about this meeting. I draw the adverse inference that Twilley would not corroborate Harris. Moreover, I note that counsel for the General Counsel did not call any of the other employees who Harris placed at the meeting.

Administrator Susan Williams testified that in an employee meeting she explained a possibility existed that if employees voted in the Union, employees could lose their annual raise ''because we would be under a contract and [annual raises would be] whatever was contained in that contract.'' Williams went on to tell employees, ''I didn't know what it would be; the Union didn't know what it would be.'' When asked repeatedly whether she ''believed,'' ''thought or expressed to employees in any form or fashion'' that there was the possibility they could lose the 40-cent across-the-board raise they had already received as a result of the outcome of the election, Williams replied credibly that she had not. I credit Williams' testimony regarding her comments to employees on the subject of losing annual raises. I find that Williams correctly and lawfully described the potential effect of collective bargaining on existing wage practices, and that her comment did not unlawfully threaten employees with reprisal. Accordingly, I shall dismiss that allegation in the complaint.

D. *Robert Tarver's Work Schedule and Verbal Warning*

Robert Tarver has worked for Respondent since February 1991. Tarver began work as a certified nursing assistant and later became a rehabilitation aide. No one disputes the fact that at first Tarver was not given a specific schedule to follow as a rehabilitation aide. Neither does anyone dispute the fact that starting on May 14, Tarver was given a specific work schedule that broke down where he was supposed to be and what he was supposed to be doing in 10- or 15-minute increments.

Director of Nursing Loretta Williams testified credibly that in mid-April 1993, she discovered one day that supplies had not been delivered to one hall of residents. When Williams investigated, she found that it was Tarver who had failed to deliver the necessary supplies. A few days later, Williams learned that Tarver had refused to cover when a regular certified nursing assistant had to leave work. Tarver based his refusal on his interpretation that all he was expected to perform were rehabilitation aide duties. Williams instructed Tarver that he was expected to help out in situations such as this. Tarver did not deny either of these incidents as described by Loretta Williams.

During the week ending Friday, May 14, Director of Nursing Williams discovered Tarver standing by a nurses' station. Williams approached Tarver and asked Tarver what he was supposed to be doing. Williams testified credibly that Tarver responded he had several things to do, but that he did not know what he was supposed to be doing then. Williams asked Tarver what his schedule said he was supposed to be doing, and Tarver told Williams he did not have a schedule. Williams told Tarver that they would get together and make a schedule.

Director of Nursing Loretta Williams drew up a proposed schedule for Tarver, and gave it to him for his review. Tarver pointed out certain problems with the proposed schedule, and the schedule was adjusted accordingly. When Tarver was satisfied with the schedule, Williams had it typed. Williams then gave Tarver a copy and kept one for herself. Counsel for the General Counsel argues that by making up a work schedule for Tarver, Williams ''altered the working conditions'' of Tarver that ''allowed Respondent to track Tarver's whereabouts.'' Neither counsel for the General Counsel nor Tarver, however, attack or dispute Director of Nursing Williams' credible testimony about the events that lead up to Williams' preparing a work schedule for Tarver. Further, Williams testified credibly that other employees follow specific written work schedules. Tarver claimed that the use of a work schedule ended shortly after the Board-conducted election. He does not claim, however, and the record does not show that Williams ever told or authorized Tarver to discontinue following the work schedule which she had prepared for him. It appears that Tarver may have simply discontinued following the work schedule, and that no specific repercussion has followed.

Contrary to counsel for the General Counsel's position that Tarver was discriminated against by having a work schedule prepared for him, the record establishes that Director of Nursing Loretta Williams suggested and developed a work schedule with Tarver based on legitimate business concerns. I note, too, that Williams included Tarver in the process of developing the schedule and obtained his agreement to the schedule before making it effective. Such care and willingness to accept input from the affected employee further supports the conclusion that Williams' actions were made in the normal course of business in response to a legitimate problem, and not out of any discriminatory motive. Accordingly, I shall dismiss that allegation from the complaint.

On Monday, May 17, Tarver stopped at a nurses' station where certified nursing assistants Darlene Mays and Paula Beaves and LPN Karen Wormley were talking. Tarver testified credibly that as he approached the group, the three were discussing the Union, and Tarver joined the conversation as he charted vital signs and weights. After the conversation ended, Wormley reported to Administrator Susan Williams that Tarver was talking to other employees about the Union and did not have any work-related reason for being at the nurses' station. Later that morning, Administrator Susan Williams called Tarver to a meeting in Director of Nursing Loretta Williams' office. Administrator Susan Williams and Director of Nursing Loretta Williams were both present. It is undisputed that Administrator Susan Williams told Tarver she knew where he stood on the Union issue, but that he could not ''talk about the Union on company time.'' Williams informed Tarver that her comments constituted a verbal warning.

It is undisputed that Respondent maintains a no-solicitation rule valid on its face that provides:

> Solicitation for any purpose of employees by other employees, while either the person being solicited or the person doing the solicitation is on work time, is prohibited. ''Work time'' does not include meal time or break times or other specified periods during the work day when employees are properly not engaged in performing their duties.

By the same token, Robert Tarver testified credibly and without contradiction that prior to union activity, there were no rules against talking about whatever employees chose to talk about. As Tarver testified, ''It was a family atmosphere where you could talk about anything.''

Respondent argues that Administrator Susan Williams was simply enforcing its valid no-solicitation rule. I disagree. There is no evidence whatever that during this conversation Tarver solicited any of the other employees to sign a union authorization card. When Tarver approached, employees were already discussing the Union, and Tarver simply spoke favorably about the Union. Prohibiting solicitation does not warrant an employer from prohibiting all discussion about a union where there is no similar prohibition on discussing other issues. I find that such a blanket prohibition on discussing a union unlawfully restricts union activities. *Columbus Mills*, 303 NLRB 223, 228 (1991); *Our Way, Inc*., 268 NLRB 394 (1983). Accordingly, I find that prohibiting Tarver from discussing the Union in this manner and issuing this verbal warning to him violated Section 8(a)(1) of the Act.

E. *Meetings Conducted by Director of Operations Larry Allen with Employees*

Evelyn Muse testified that she attended an employee meeting conducted by Director of Operations Larry Allen in May 1993, during which Allen threatened to close the Southgate facility before he would allow employees to be represented by the Union. According to Muse, Allen made the statement that having a union did not equal job security. Muse testified that in conjunction with that comment Allen expressly told employees that ''before he would let a union in, he would close the place down.''

Out of all the employees who attended this meeting, Muse was the only witness called by counsel for the General Counsel who testified Allen made such a statement to employees in this, or any other employee meeting. In fact, no other employee was called to testify who offered even remotely similar testimony. Yet, when Muse was asked to describe what else took place at this meeting, she was unable to do so. Muse could not recall Allen's remarks to employees other than the alleged threat. In view of Muse's selective memory, and the absence of corroborating evidence from other employees, I find it impossible to credit Muse regarding the alleged critical remarks.

Director of Operations Larry Allen, on the other hand, provided a detailed account of his remarks to employees. It is undisputed that early in the union campaign, the Union distributed literature to employees that accused Respondent of making threats to close the Southgate facility if employees selected the Union. Allen testified credibly that at one of the employee meetings in which Respondent presented its campaign, one employee asked Allen what would happen if the Union was chosen to represent them. Allen testified credibly that he explained the range of possible scenarios regarding collective bargaining, including a ''best case'' and ''worst case'' scenario. Allen admits he told employees that the ''worst case scenario'' was the possibility that financial pressures would put the facility out of business. Allen admits he referred to a newspaper article describing a nursing home that faced potential bankruptcy due to the financial costs associated with the Union's demands for health insurance in collective bargaining. Allen told employees that this was the worst case possibility ''because we're a small company and the issues financially would be so critical that we would not be able to stay in operation.'' Allen stated, ''that if we came into that financial situation, the worse case scenario is that we might be forced to close the business.'' Allen testified credibly that he also told employees about the ''best case scenario'' in which the result of collective bargaining was that the Company and the Union would be able to agree on all issues. Finally, Allen told employees that the more likely outcome would be an agreement that reflected something in between the positions initially adopted by both the Company and the Union.

After the meeting in which Allen first described the ''best and worst case scenarios'' if employees selected the Union to represent them, union literature again charged Allen with threatening to close Southgate if the Union was selected by employees. Allen testified credibly that, as a result, he again addressed the best and worst case scenarios at a second employee meeting. Allen testified credibly that after describing the best case and worst case scenarios once again, he specifically stated to employees that he had not said he would close Southgate due to a union victory in the election. Allen's testimony on this point stands uncontradicted, and I found his testimony altogether credible.

The complaint alleges and counsel for the General Counsel argues that Allen threatened to close Respondent Southgate if employees selected the Union to represent them for purposes of collective bargaining. The credible evidence does not support that conclusion. I do not credit Muse that Allen blatantly threatened to close the facility before he would allow employees to select the Union as their bargaining representative. I credit Allen regarding his remarks to employees. The record quite clearly reflects that the only comments Allen made that were specifically focused on the potential closure of Southgate occurred after the Union first raised the issue by claiming that Allen had made such a threat. These claims initially emanated from the Union's own campaign literature. I find that Allen's comments accurately and lawfully described the potential effects of the collective-bargaining process. Counsel for the General Counsel relies on a number of Board cases that hold that while an employer is free to tell employees the precise effect he believes unionization will have on his company, the employer's predictions must be carefully phased on the basis of objective facts that show demonstrably probable consequences beyond his control. *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969); *Crown Cork & Seal Co*., 308 NLRB 445 fn. 3 (1992). Those cases are inapposite. The record here shows that Allen did not attempt to make a specific prediction of what would happen if Respondent's employees selected the Union. Rather, after being accused by the Union of making threats to close, and after being asked by an employee what might happen if employees selected the Union, Allen correctly and accurately

described the possible consequences of collective bargaining, including both the worst case and best case scenario. Allen also described the probable likelihood of meeting some middle ground. I find that Allen's comments did not violate Section 8(a)(1) of the Act. Accordingly, I shall dismiss those allegations in the complaint.

F. *The New Employee Handbook*

It is undisputed that a new employee handbook was prepared, printed, and distributed to Respondent's employees on May 17, just 4 days before the Board-conducted election. The record reflects that the employee handbook in effect prior to May 17 was instituted sometime in early 1991. During 1992, Director of Support Services Jerry Stultz started work on preparing a new handbook. In July 1992, Director of Operations Larry Allen sent a copy of a new proposed handbook to all administrators for review and comment. According to Allen, the plan was to present the revised handbook in September 1992. Stultz left in the fall of 1992, however, and the handbook revision had not been completed. The project was then assigned to Kathy Allen, who replaced Stultz. In January 1993, the handbook was still undergoing revisions. Allen completed additional work and her final product was reviewed by both Respondent's old and new legal counsel in the months of January through March 1993. On April 30, Allen notified administrators at all of Respondent's facilities that the new handbook was ready and had been shipped to each nursing home. The administrators of each facility were instructed, however, not to open or distribute the handbooks. On May 7, Allen established a schedule for meeting with employees at each facility to explain and distribute the new handbook. Meetings were scheduled at each of Respondent's seven facilities beginning on May 13 and ending on May 24. The meeting with employees of Southgate was scheduled for and held on May 17, 4 days before the Board-conducted election on May 21.

The new handbook provided detailed information about vacation days, sick leave, and funeral leave, while the old handbook did not include any provisions for these benefits. Allen told employees the new policy included funeral leave to cover the deaths of in-laws and step parents and grandparents. Carter testified the old sick leave policy required an employee to be ill for 3 days in order to be paid for the first day, while the new sick leave policy allowed for coverage the first day of an employee's illness.

Respondent does not dispute the fact that the new employee handbook added a disability section and family leave, included a revised funeral leave policy that included 4 days and applied to a wider range of family members and included a new and/or comprehensive sick leave coverage.

G. *May 19: Discharge of Brenda Howard*

Brenda Howard worked at Southgate as a certified nursing assistant for approximately 4 weeks from April 21 to May 19. When Howard was hired, the union campaign had been underway for approximately 2 months.

Howard testified that a few days before the election, in fact the day before she was terminated, as Howard was leaving work, Director of Nursing Loretta Williams told Howard that she wanted to see Howard in her office. According to Howard, Williams asked how things were going for Howard. According to Howard, Williams then stated that she was not supposed to talk to Howard about this or to ask her anything about this, but Williams wanted to know what Howard thought of the Union. Howard testified she responded and said that she thought it was ''just fine.'' According to Howard, Williams responded by saying that she did not understand why employees wanted a union since Williams basically ''let them do like they please anyway.''

Director of Nursing Loretta Williams denied having this conversation with Howard, at least as Howard described it. Williams testified credibly that not long after Howard began working for Respondent LPN Patricia Hill and LPN Janice Kinney both began complaining about Howard being uncooperative. LPNs Patricia Hill and Janice Kinney both corroborated Williams that they complained about Howard's attitude and her not wanting to take the sections assigned to her. I found both Hill and Kinney to be credible witnesses. Hill, for example, candidly testified that Howard was capable of being a good worker, noting however, that the problem was Howard having a bad attitude and being belligerent. Hill credibly testified about Howard having a particularly bad attitude about not wanting to take certain sections assigned to her. Both Hill and Kinney candidly admitted that Howard was assigned some of the more onerous work because she was the newest certified nursing assistant. Howard did not like that fact and complained loudly.

Williams testified that, on May 17, Howard called Williams and complained that others were picking on her. That evening, Williams met with employees including Howard, Kinney, and Hill. Williams testified that after the meeting ended, Howard remained behind. Williams testified credibly that Howard then volunteered to Williams that she was easy to talk to, that Howard did not see why employees needed a union, and that Howard thought everyone ''could just get along.'' Williams testified credibly that she told Howard she agreed with her. Williams also testified credibly that as a result of this conversation Williams never had any idea that Howard supported the Union. As I have said before, Loretta Williams impressed me as a very credible witness. I credit Williams' denial that she interrogated Howard concerning Howard's union sentiments, and I shall dismiss that allegation from the complaint.

Director of Nursing Loretta Williams testified credibly that Howard's attitude was a matter of concern to her from the time she hired Howard, and the employee meeting on May 17 represented a critical factor in her decision to terminate Howard. Williams explained that before she hired Howard in late April, Williams checked Howard's employment references and was warned about Howard's attitude. Williams was told that Howard had a bad temper and could ''fly off the handle'' easily. Williams testified that she spoke to Howard about this at the time she hired Howard, and told Howard that her attitude toward other employees would be a matter of particular concern during Howard's probationary period. Within a few weeks after Howard began work, LPNs Hill and Kinney both complained about Howard's attitude. Howard, in turn, complained that she was being picked on by others.

Director of Nursing Williams testified that after the meeting with employees on May 18, she telephoned nightshift certified nursing assistant Barbara Nelson to ask about Howard. Williams testified credibly that her reason for doing so

was that Nelson was not the type of person who would complain openly about someone, but who would share her thoughts privately if asked. Williams testified credibly that when she asked Nelson about the situation Nelson said the problem was Brenda Howard. Williams testified that it was then she decided to discharge Howard.

It is undisputed that at some point Williams asked Hill and Kinney to memorialize their complaints about Howard. Counsel for the General Counsel attempts to portray this as evidence that Director of Nursing Williams was manufacturing evidence against Howard to support her discharge. Looked at objectively, however, Williams' request represents no more than reasonable caution to document the reasons for discharging Howard. This is particularly true where Williams' ultimate decision was based in part on comments by a fellow employee who was reluctant to be critical. Counsel for the General Counsel also argues that because Respondent did not present Barbara Nelson to testify about and corroborate the conversation that Williams noted was determinative, an adverse inference should be drawn that Nelson would not corroborate Williams. I refuse to draw that inference. Before closing the hearing I recessed in order to give counsel for the General Counsel an opportunity to contact Barbara Nelson. After this recess, the hearing resumed, and eventually concluded with the express understanding that if counsel for the General Counsel located Nelson and Nelson was willing to testify, and if Nelson offered testimony that supported counsel for the General Counsel's case, she could make a motion to reopen the proceeding, which I would be favorably disposed to grant. Nothing like that has occurred. Rather than draw an adverse inference against Respondent, I am very much inclined to credit Director of Nursing Loretta Williams when she testified that Nelson was a reluctant witness, and that is why neither Respondent nor counsel for the General Counsel called her to testify.

On May 19, Director of Nursing Williams met with Howard and explained that she was being terminated because of her uncooperative attitude.

In summary, the record shows that Brenda Howard's attitude was a problem of concern to Respondent from the time Williams agreed to hire Howard. Shortly after she began working for Respondent, two different LPNs complained to Williams about Howard's work attitude. At the same time, just a few days before her discharge, Howard herself triggered the sequence of events that culminated with her dismissal by complaining to Williams that other employees were picking on her. On May 18, Director of Nursing Williams had a meeting with employees on Howard's shift to give them and Howard an opportunity to express themselves and attempt to work things out. Following the meeting, Howard stayed behind and volunteered to Williams that Williams was easy to talk to, that Howard did not see why employees wanted a union, and that Howard thought everyone could just get along. After this meeting, Director of Nursing Williams telephoned one of Howard's fellow certified nursing assistants, Barbara Nelson, to ask her opinion about the situation. Nelson told Williams that Howard was the cause of the problems, and Williams decided to terminate Howard, which she did the following day. Simply stated, I find that counsel for the General Counsel has failed to carry its burden of proof that protected activity was a motivating factor in Howard's discharge. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Accordingly, I shall dismiss that allegation from the complaint.

H. *May 21: Conversation Between Evelyn Muse and Director of Nursing Loretta Williams*

Evelyn Muse testified that on election day, right outside of Director of Nursing Loretta Williams' office, and before Muse had voted, Williams approached her and told Muse to ''vote no.'' According to Muse, Williams went on to state that ''Mr. Allen had already given us the insurance . . . . It was gonna take effect Monday after the election and that we didn't need the Union, so vote no.'' Muse asserted that Williams knew employees ''wanted that free health insurance more than anything else in the world.''

As I have already noted, my observation of Muse as a witness did nothing to instill confidence in her testimony. Director of Nursing Loretta Williams credibly denied making any statement regarding employee insurance to Muse. Further, Williams offered a totally credible version of a much different conversation with Muse on election day. Williams testified that she did have a conversation with Muse on election day but after the election was already over. According to Williams, Muse approached her and told Williams that Williams ''owed her a favor—I voted no.'' I found Williams' testimony entirely credible. Accordingly, I find that Williams did not promise Muse or other employees improved insurance benefits in order to try to dissuade them from voting for the Union, and I shall dismiss that allegation from the complaint.

I. *June 1993: Robert Tarver's Layoff and Warning*

On June 12, approximately 3 weeks after the Board-conducted election, Robert Tarver was laid off. It is undisputed that at first, Tarver was to be laid off only a few days, but Tarver requested that he be allowed to use vacation time instead of being laid off, and so Tarver was scheduled off for 1 week. At the end of that first week, the layoff was extended 1 more week, for which Tarver also took vacation in order to be paid. Director of Nursing Loretta Williams testified that when the census, or patient count, decreased it was necessary to lay off employees. Williams testified that Tarver was selected for the layoff because employees in the rehabilitation area are the employees first selected for layoffs since those employees can most easily be temporary eliminated. As her testimony progressed, however, it became clear that in fact Williams knew little about Tarver's layoff. Although Williams first testified that Tarver was working as a rehabilitation aide and was therefore selected for layoff, she later admitted that in fact she was not sure what Tarver's duties were at the time of the layoff. Williams testified that sometime shortly after the Board-conducted election, Tarver was moved from rehabilitation aide back to nurse's assistant. After Tarver was then accused by several patients of abuse, Williams assigned Tarver to pick up clothes and pass out water. Williams testified that she thought Tarver was performing the latter duties when he was laid off, but that she was not sure. Shortly after that, Williams candidly admitted that in fact she did not make the decision to lay off Tarver. Loretta Williams admitted that Administrator Susan Williams

made both the decision to lay off and the decision to chose Tarver.

Despite the fact that Administrator Susan Williams testified, Respondent failed to present any evidence from her about the layoff or why Tarver was selected for the layoff. Thus, Director of Nursing Loretta Williams was left trying to explain a decision made by Administrator Susan Williams. Although Loretta Williams testified that Tarver was laid off due to a low census, it is clear that she was simply testifying to something she had been told by someone else. Further, I note that Respondent failed to introduce any records to support the testimony offered through Loretta Williams that Respondent was suffering from a low census count that required a layoff.

That Tarver was an active and avid union supporter is not in dispute. The record further reflects that Respondent was well aware of Tarver's union activities. This fact is amply demonstrated by Administrator Susan Williams' verbal warning to Tarver for talking to fellow employees, discussed above, which was found to violate Section 8(a)(1) of the Act. That warning must also be considered to constitute animus on Respondent's part toward union activity. Accordingly, counsel for the General Counsel has established a prima facie case suggesting that Tarver's union activities and sentiments played some part in his layoff. I strongly suspect that Tarver's layoff had more to do with the fact that he had been accused by patients of abuse and had therefore been assigned busy work more than it had to do with Tarver's union activity. For its own reasons, however, Respondent chose not to elaborate and dwell on patients' accusations of abuse by Tarver. By making that choice, Respondent chose as well not to provide any meaningful response to counsel for the General Counsel's prima facie case. Consequently, I find that Tarver's layoff was at least in part motivated by his union activities and sentiments, and thereby violated Section 8(a)(1) and (3) of the Act. *Wright Line*, supra.

Although it is not addressed in counsel for the General Counsel's posttrial brief, the complaint alleges that on or about July 8, Respondent issued a warning to Robert Tarver in retaliation for his union activities. The record reflects that on returning from layoff on June 27 Tarver was assigned patient care duties as a certified nursing assistant. On July 2, two patients in one of the rooms assigned to Tarver were found to have been improperly ignored. While making rounds, LPN Debbie Wallace, who was responsible for these patients, found that one patient had not received lunch. Wallace approached Tarver, who said he had no knowledge of the patient not getting lunch. Later that day, Director of Nursing Loretta Williams was making rounds and found another of the patients in Tarver's area had not been properly attended to and was wet with urine. Williams approached Wallace, who told Williams she had written up discipline for Tarver but was afraid to give it to him. As a result, Williams gave Tarver the written warning.

Tarver does not deny being responsible for these patients. The record reflects that other employees had been issued similar written warnings under similar circumstances. Respondent introduced examples of similar written warnings for similar offenses given to other certified nursing assistants. Considered as a whole, the record evidence convincingly demonstrates that the warning issued to Tarver was based completely on business-related considerations, and not on Tarver's union activities. Accordingly, I shall dismiss that allegation from the complaint.

Analysis and Conclusions

Most of the complaint allegations involving individual incidents have been discussed and analyzed above. I have intentionally left until now the discussion and analysis of those complaint paragraphs which allege that Respondent unlawfully granted certain benefits to employees, i.e., the wage increase and the improved benefits set forth in Respondent's new employee handbook. For the following reasons, I find that by granting those improve benefits, Respondent violated Section 8(a)(1) of the Act.

The Board and Federal courts have ruled that when wage increases are granted during the course of an election campaign, the burden is on the employer to overcome the presumption that benefits were intended to influence the employees to vote against the Union. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964); see *Speco Corp.*, 298 NLRB 439 (1990), and cases discussed therein. The Board will find a violation of Section 8(a)(1) when benefits are conferred during the pendency of an election and the employer is unable to establish a nondiscriminatory, business-related basis for the granting of benefits. As Judge Bernard Ries stated in *Speco Corp.*:

> The announcement becomes perilous . . . when the employer has, and exercises, discretion in choosing the time for announcement; timing may not be manipulated to heighten the impact of a new benefit, a subject to which employees are keenly sensitive.

Contrary to Respondent's argument that the 40-cent-per-hour across-the-board wage increase granted in late March 1993 was part of a pattern of Respondent granting annual wage increases, the record does not support a conclusion that Respondent had any regular practice of granting such across-the-board wage increases. As already discussed in detail above, when Administrator Susan Williams attempted to explain the 1992 wage increase that was supposedly granted as a result of the September 1991 wage survey, her testimony was often nonresponsive and invariably circuitous. Finally, Administrator Williams was forced to admit that the wage increase which she recommended in September 1991 for nursing assistants was not granted. Careful review of the exhibits introduced by Respondent strongly suggests that the salary changes reflected for 1990 and 1991 are no more than a change in the Federal minimum wage and a uniform allotment paid to the employees. The record simply does not support Respondent's argument that there was any regular practice of granting employees across-the-board wage increases on an annual basis.

There is no question whatever that when Respondent decided to grant Southgate employees the 40-cent across-the-board wage increase in late March 1993, it was fully aware of the union campaign among employees. Indeed, the petition in Case 10–RC–14358 had been filed on March 11. The record supports a conclusion that as soon as Respondent found out about the union campaign, and particularly about dissatisfaction with wages, it immediately acted to try to influence the former by improving the latter. I find that the wage increase granted to employees in late March shortly

after the Union filed its petition was intended to influence the employees to vote against the Union, and that by granting this wage increase, Respondent violated Section 8(a)(1) of the Act.

With regard to the improved benefits granted by Respondent to employees in the new employee handbook, one cannot say that employees would not have received these improved benefits but for the Union. Indeed, the record here suggests that employees probably would have received these improved benefits eventually regardless of the Union. The record, however, strongly suggests that the handbook, like the across-the-board raise, represented Respondent's quick response to curb the Union's campaign. What is even more obvious, however, is that Respondent manipulated the time for announcing these improved benefits to Southgate employees so as to occur just prior to the election. Respondent does not even seriously deny this point.

It was not until April 30, almost 6 weeks after the Union filed its representation petition, that Respondent notified administrators at the various facilities that a new handbook was ready and had been shipped to each facility. Even then, the administrators of each facility were instructed not to open or distribute the handbooks to employees. On May 7, Respondent established the schedule for meeting with employees at each facility to explain and distribute the new handbook. Meetings were scheduled at each of Respondent's seven facilities beginning on May 13 and ending on May 24. The meeting with employees at Southgate Village was held on May 17, just 4 days before the Board-conducted election. There is no question whatever that Respondent could just as easily have conducted the meeting at Southgate after the election. The conclusion is inescapable that Respondent manipulated the timing for announcing these new benefits to employees at Southgate in order to heighten the impact of those benefits and thereby influence the outcome of the election. I find that by doing so, Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent Southgate Village, Inc. is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers Union, Local 1657, AFL–CIO, CLC is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent granted employees an across-the-board wage increase in order to dissuade employees from supporting the Union, and Respondent thereby violated Section 8(a)(1) of the Act.

4. Director of Nursing Loretta Williams did not unlawfully interrogate Katrina Dancy concerning her union activities or sentiments, and that allegation is dismissed.

5. Supervisor Helen Tootle did not unlawfully interrogate Katrina Dancy concerning her union activities and sentiments, and that allegation is dismissed.

6. LPN Patricia Hill did not threaten Brenda Howard that Respondent would close its facility if employees selected the Union to represent them for purposes of collective bargaining, and that allegation is dismissed.

7. Director of Nursing Loretta Williams did not threaten employee Evelyn Muse that Respondent would discharge or otherwise retaliate against Robert Tarver because of his union activities or sentiments, and that allegation is dismissed.

8. Director of Nursing Loretta Williams did not unlawfully prevent employees from bringing union literature onto Respondent's premises and did not threaten Jenifur Harris or other employees that Respondent would close the nursing home if employees selected the Union to represent them for purposes of collective bargaining, and those allegations are dismissed.

9. Administrator Susan Williams did not unlawfully threaten Jenifur Harris or other employees with a loss of wages or other benefits if they selected the Union to represent them for purposes of collective bargaining, and that allegation is dismissed.

10. Director of Nursing Loretta Williams developed a work schedule for and with Robert Tarver for legitimate business reasons and not to discriminate or retaliate against Tarver for his union activities or sentiments, and that allegation is dismissed.

11. Administrator Susan Williams unlawfully limited Robert Tarver from talking about the union on companytime, and Respondent thereby violated Section 8(a)(1) of the Act.

12. Director of Operations Larry Allen did not threaten Evelyn Muse or other employees that Respondent would close its facility before it would allow employees to be represented by the Union, and that allegation is dismissed.

13. Respondent granted employees improved benefits, including improved sick leave, funeral leave, and disability leave in order to dissuade employees from supporting the Union, and Respondent thereby violated Section 8(a)(1) of the Act.

14. Director of Nursing Loretta Williams discharged Brenda Howard for legitimate business reasons, and not to retaliate or discriminate against Howard because of her union activities or sentiments, and that allegation is dismissed.

15. Director of Nursing Loretta Williams did not promise Evelyn Muse or other employees improved benefits in order to dissuade them from supporting the Union, and that allegation is dismissed.

16. Respondent temporarily laid off Robert Tarver because of his activities on behalf of, or sentiments favoring, the Union, and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

17. Director of Nursing Loretta Williams issued a written warning to Robert Tarver for legitimate business reasons and not to retaliate or discriminate against Tarver because of his union activities or sentiments, and that allegation is dismissed.

18. The unfair labor practices which Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and

desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As a part of the remedy in this case, counsel for the General Counsel seeks an order requiring Respondent to recognize and bargain with the Union. Counsel for the General Counsel established that the Union did obtain a bare majority of employee signatures on authorization cards designating the Union as their collective-bargaining agent. As we know, the Union did not receive a majority of the votes cast in the May 21 election.

A bargaining order remedy is appropriate only where the unfair labor practices which Respondent has been found to have engaged in are so serious and of such a pervasive nature as to make unlikely the holding of a free and fair election. *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969); *Kay Motors*, 264 NLRB 1030 (1982). On reflection, I am not convinced that the unfair labor practices in this case are sufficiently severe to warrant the issuance of a bargaining order. The complaint alleged a number of unfair labor practices, including several ''hallmark violations,'' which are not supported by credible evidence in the record, and which have been dismissed. The unfair labor practices which I found to have occurred during the ''critical period'' between the filing of the petition and the election are limited to Respondent granting employees an unlawful wage increase and certain improved benefits, including improved sick leave and funeral leave, and a single instance of Respondent's administrator unlawfully limiting an employee from talking about the Union on companytime. Although none of these unfair labor practices are to be taken lightly, nor do I find that they constitute the pervasive type of unfair labor practices that call for the issuance of a bargaining order remedy.

Counsel for the General Counsel argues that a bargaining order remedy is warranted based solely on Respondent granting the unlawful wage increase, citing *Honolulu Sporting Goods*, 239 NLRB 1277 (1972). In that case, however, the Board referred to Respondent's action as ''a massive pay raise that encompassed both small step increases based on merit and longevity and radical upward revision of the entire applicable wage structure.'' Later, the Board referred to Respondent having made a ''major revision in its basic wage structure.'' Respondent's actions in this case cannot be said to rise to that level. In fact, as I have noted above, the record suggests that the improved benefits granted to employees in the new handbook would probably have been granted eventually regardless of the Union. The real vise in granting those particular improved benefits is that Respondent clearly manipulated the time for announcing those benefits in order to heighten their impact and thereby influence the outcome of the election. The across-the-board raise, while significant, can hardly be described as ''massive'' or encompassing ''a radical upward revision of the entire applicable wage structure.'' Accordingly, I decline to recommend the issuance of a bargaining order as part of the appropriate remedy here. I do recommend, however, that because of the unfair labor practices which I have found to have occurred during the ''critical period,'' the Union's objections to the election be sustained and the election held on May 21 be set aside and a second election be conducted by secret ballot among the employees in the appropriate unit at such time and manner as the Regional Director deems appropriate.

Although I have found that Respondent temporarily laid off Robert Tarver unlawfully because of his activities on behalf of the Union, I find it impossible using traditional Board remedies to fashion an affirmative remedy requiring Respondent to ''make whole'' Tarver by paying him any particular sum as backpay for the unlawful layoff. When Tarver was confronted with the layoff, he requested and was allowed rather than being laid off to take the time as paid vacation. Therefore, Tarver did not suffer any adverse economic consequences from the layoff. My temptation to require Respondent to make whole Tarver because Tarver was clearly inconvenienced by not being able to take a paid vacation at a later time would, however, result in double pay to Tarver for a time when he did work. I find that such a remedy would be punitive and contrary to existing Board policy. Accordingly, no monetary make-whole remedy is afforded Tarver.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Southgate Village, Inc., Bessemer, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Granting employees wage increases in order to dissuade them from supporting the Union.

(b) Granting employees improved benefits, including improved sick leave, funeral leave, and disability leave in order to dissuade them from supporting the Union.

(c) Limiting employees from talking about the Union on companytime.

(d) Laying off employees because of their activities on behalf of, or sentiments favoring, the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility located in Bessemer, Alabama, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's representative, shall be posted it immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''